150 No. (1)

Supreme Court, U.S.
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09-831

In The

SUPREME COURT OF THE UNITED STATES

JONI MIHELICH,
Petitioner,

v.

ACTIVE PLUMBING SUPPLY CO.
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

PETITION FOR A WRIT OF CERTIORARI

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January 11, 2010

QUESTION PRESENTED

The "Contract Clause" in the United States Constitution guarantees that American citizens are entitled to contract enforcement without state intervention at common law. The question presented is:

> Does the Contract Clause of the Constitution prohibit the Judgment in the trial court below against Petitioner in her consumer action against a liable retailer?

RULE 29.6 STATEMENT

Petitioner Joni Mihelich is an individual person not subject to Rule 29.6.

Respondent Active Plumbing Supply Co. is an Ohio corporation headquartered in Willoughby, Ohio.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review and judgment and opinion of the Ohio Supreme Court decided on October 14, 2009 and the underlying decision of the Ohio Eighth District Court of appeals decided on July 16, 2009.

OPINIONS BELOW

The Ohio Supreme Court did not issue an opinion but declined jurisdiction on October 14, 2009 in the Case No. 2009-1236. The opinion debated herein is that which was issued by the Eighth District Court of Appeals on May 21, 2009. This was an unreported decision in Case No. CA-09-90965, Journal Entry and opinion number 90965, and is reproduced in the Appendix to this Petition. (App. B.). The trial court's decision is not reported but is also reproduced in the Appendix to this Petition. (App. C).

JURISDICTION

The judgment of the Court of Common Pleas, Cuyahoga County, Ohio was entered on December 31, 2007. The Appellate Court of Ohio, Eighth District, entered judgment on May 21, 2009. The Ohio Supreme Court entered a final judgment on October 14, 2009. This court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender, in Payment of Debts; pass any Bill of Attainder, ex post facto Law, **or Law**

impairing the Obligation of Contracts, or grant any Title of Nobility.

Article I, Section 10, Clause 1, United State Constitution.

STATEMENT OF THE CASE

This case presents an important issue regarding a citizen's right to contract enforcement. If the state of Ohio can deny Joni Mihelich a chance to make her complaint to a retailer, then consumer rights suffer irreparably. The contract clause of the U.S. Constitution prohibits action taken by the State such as that engaged in by the trial court below.

On March 28, 2005 Rick Mihelich signed a contract for delivery of new kitchen cabinets for $34,100.00 There is no dispute that this is the contract. Mr. Mihelich signed the contract on behalf of RAM Management (his consulting company) for the benefit of his wife and family.

On April 4, 2005 Mr. Mihelich wrote a letter to Active Plumbing, stating he was a victim of "bait and switch".

Price complaints were resolved on April 13, 2005. On May 5, 2005, Active Plumbing told Mr. Mihelich that the cabinets would not arrive by the promised delivery date of May 16, 2005. Mihelich

told Defendants that this "was not acceptable". Defendants responded by canceling the contract, leaving the Mihelich's high and dry.

Mitigating their damages, the Mihelich family started from scratch with a new company and new measurements, forcing the completion of the job to be delayed 266 days.

RAM Management and Mrs. Mihelich as third party beneficiary of the contract sued Active Plumbing for damages resulting from cancellation of the contract.

The trial court treated Mr. Mihelich's statement that the delay in delivery was not acceptable as a repudiation justifying active's cancellation of the contract.

This action by the trial court violates Joni Mihelich's right to avoid state action that strips her of her right to contract enforcement under Article 1, Clause 10 of the U.S. Constituion, the "contract clause".

REASONS FOR GRANTING THE WRIT

A Complaint does not constitute a repudiation. If it does, then the concept of consumer rights has been turned on its ear. Consumers have the right to be protected under the contract clause from state action such as that undertaken by the trial court in this matter.

All parties and the Trial Judge all agree that the only language of repudiation used by the Plaintiff was Mr. Mihelich "stating that any delivery date later than May 15th was 'unacceptable'

According to the Trial Court, this statement alone was a repudiation justifying Active Plumbing's cancellation of the contract. Trial Opinion, Appendix C.

Not one single case in Ohio or anywhere in America describes customer unhappiness with a delay in delivery as a repudiation of a contract.

Petitioner pleads with this Court to review the record and even the Trial Court's findings. Is this Court willing to tell consumers that they better not describe a delay as "unacceptable" ?

If Active Plumbing prevails, virtually any strong stand taken by a consumer will result in cancellation of the contract as in the case of the Mihelich family.

The case of *Wren Reese, Inc. v. Great Lakes StructuralConcrete Products, Inc.* 50 Ohio App.2d 168, 362 N.E. 2d 269 (1975), the 6th District Ohio Court of Appeals described real repudiation. In that case a steel seller was found to be repudiating because he unilaterally increased prices above the contract price. Id.

Mihelich did nothing of that sort. He merely told the seller that a delay in delivery was unacceptable.

This court is asked to take this case to allow justice to prevail. The court's action at the trial level is jus the type of state action prohibited by the Contract Clause in Article 1, Section 10 in our constitution.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Mihelich family requests that this court grant certiorari.

Respectfully submitted,

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APPENDIX

Appendix A:

October 14, 2009 Supreme Court of Ohio Denial of Cert

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals No. 09065)

Appendix B:

May 21, 2009 Appellate Court of Ohio Opinion

CHRISTINE T. McMONAGLE, P.J.:

After a bench trial, the trial court entered judgment in favor of defendant-appellee, Active Plumbing Supply Co., and against plaintiffs-appellants, Joni Mihelich and Ram Management Group, Inc. on their breach of contract claim.

We affirm.

I. Background

The evidence at trial revealed the following. Active Plumbing sells and delivers kitchen cabinets. In February of 2005, Joni Mihelich began working with active Plumbing's representatives regarding new kitchen cabinets for her home. On March 28, 2005, Joni's husband, Richard Mihelich, signed a contract with Active Plumbing, on behalf of his consulting company Ram Management Group, for custom-made cabinets for the Mihelichs' home. The cost of the custom cabinets, to be manufactured by Omega, was $34,105. Richard signed every page of the

17-page contract, which detailed the cabinet design, cost, and delivery date of May 15, 2005, and made a down payment of $17,000 for the cabinets.

One week later, on April 4, 2005, Richard sent a letter to Active Plumbing in which he complained that appellants had been overcharged for the cabinets by more than $12,000 and were the victims of "bait and switch" tactics. Richard requested that Bob Kirk, Active Plumbing's sales manager, contact him at his "earliest convenience to communication your action plans to correct this situation."

Because of the serious nature of Richard's allegations, and because the cabinets were to be custom-made, Kirk brought the letter to the attention of Active Plumbing's store manager, Stu Bennett, on April 8, 2005. Bennett immediately called Richard at the number he had provided in his letter. When Richard did not answer, Bennett left a message on Richard's voicemail in which he asked Richard to call him and told him that the cabinets would not be ordered until his concerns had been resolved.

Richard did not call Bennett back in the next several days. He finally called Bennett back on April 11, 2005, after the store had closed. Bennett called Richard back on the morning of April 12, 2005; Richard did not answer the call and Bennett left a message asking Richard to call him. That afternoon, when Richard still not had called, Bennett called him against and left another message.

Richard did not return Bennett's calls until April 13, 2005. In his conversation with Bennett, Richard again complained that appellants had been overcharged for the cabinets. Bennett explained to Richard that the cabinets had not yet been "released" for production by the manufacturer due to Richard's pricing concern.

Later that afternoon, Bennett called Richard and offered him two options: 1) a cost reduction of $1,700 to continue with the contract, and Active Plumbing would "release" the cabinets for production at the next production release date; or (2) cancellation of the contract, a refund to Richard of his deposit, and free use by appellants of the plans that Active

Plumbing had drawn up for the Mihelichs' kitchen. Richard elected the $1,700 discount and told Bennett to "move forward" with the contract.

Accordingly, on April 19, 2005, the next production release date, Active Plumbing "released" the cabinets for production. Subsequently, on May 4, 2005, Omega, the cabinet manufacturer, advised Active Plumbing that the cabinets would be delivered around May 31, 2005 (not May 15, 2005 as specified in the original contract before the pricing dispute).

When Bennett telephoned Richard and advised him of the delivery date, Richard "went ballistic" and informed Bennett that the delivery date was "unacceptable." He told Bennett that if the cabinets were not delivered by May 15, "it's going to start costing you a lot of money." Bennett testified that Richard's concerns prior to that time had been solely about the cabinet pricing, and that he had never communicated to Bennett that a later delivery date would be a problem, despite Bennett's numerous advisements that the cabinets would not be ordered until the pricing issue had been resolved.

Later that day, Bennett advised Richard that Active Plumbing was terminating the contract and refunding his deposit. The next day, Active Plumbing sent a letter to the Mihelichs advising them that the contract was being terminated; a check for a full refund of the deposit was included with the letter. The Mihelichs did nothing to dispute the termination of the contract until appellants filed this lawsuit approximately one year later.

In the meantime, they tried to order the same Omega cabinets from another cabinet distributor. A representative from Warehouse Cabinets, who Richard contacted in either April or May 2005, testified that Wearehouse Cabinets could have provided the same Omega cabinets to the Mihelics within six to eight weeks of their order. The Michelichs did not order from Warehouse Cabinets, however, and continued to contact other cabinet distributors. Eventually they contracted with Somrak Kitchens for a complete kitchen redesign. Darlene Somrak, a designer at Somrak Kitchens, testified that she worked with Joni Mihelich for about eight months before the Mihelichs finalized the contract with Somrak

Kitchens. The new kitchen was completed in January 2006 at a cost of $57,563.

In September 2006, appellants filed suit for breach of contract. They sought damages as follows: $57,563 for the cost of the new kitchen cabinets; $16,642.50 for a general contractor to install the cabinets (the contract with Active Plumbing did not include installation); $12,000 for Richard Mihelich's lost vacation time; $37,506 for the cost of means eaten out for 266 days when the Mihelich's kitchen allegedly could not be used; $30,969.15 for the Mihelichs' loss of use of their home during the kitchen remodeling product (although they lived in their home the entire time); all with interest at 18 percent, plus $18,783.33 in attorneys' fees.

The trial court entered judgment in favor of Active Plumbing and against appellants. The court held that Active Plumbing rightfully cancelled the contract because appellants repudiated the contract price when Richard Mihelich claimed they were the victims of "bait and switch" tactics and demanded a reduction in the price. The trial court found that the revised contract, with a $1,700 price reduction but a delayed delivery

time, was not acceptable to applicants, and therefore Active Plumbing rightfully cancelled the contract "because plaintiffs had repudiated the price and would not accept the cabinets." The trial court held further that appellants acquiesced in the cancellation of the contract. Finally, the trial court held that the damages claimed by appellants were "completely unsupported and absurd." The Court found that appellants were "asking for damages [of] over a quarter of a million dollars for $34,000 cabinets that they could have had in 6-8 weeks. The plaintiffs themselves are responsible for their kitchen problems."

II. Discussion

Appellants argue on appeal that the trial court's judgment was in error because they did not repudiate the contract but "merely complained" to Active Plumbing. They contend that affirming the trial court's decision will mean that in the future vendors will cancel customers contracts any time a consumer takes a "strong stand" with the vendor. We are not persuaded.

Under R.C. 1302.68, when either party to a commercial contract for the sale of goods repudiates the contract "with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other," the aggrieved party may resort to any remedy for breach set forth in R.C. 1302.77. The remedies include cancelling the contract.

A party repudiates a contract when the party insists upon terms contrary to the parties' agreement to the point where that insistence "amounts to a statement of intention not to perform except on conditions which go beyond the contract." Official Comment to R.C. 1302.68. The repudiating party must clearly and unequivocally relay its intention not to perform its contractual obligations. *Rodata, Inc. v. Christian & Timbers*, 8th Dist. No. 79439, 2002 Ohio 3, citing *Am. Bronze Corp. v. Streamway Products* (1982), 8 Ohio App.3d 223, paragraph three of the syllabus. A mere request for a change in the terms or a request for cancellation of the contract is not in itself enough to constitute a repudiation. *Lancaster v. Rahlfs* (June 2, 1994), 8th Dist. No. 66146. Whether a repudiation

occurred is a question of law. Id., citing *Nuco Plastics, Inc. v. Universal Plastics, Inc.* (1991), 76 Ohio App. 3d 137.

We find no error in the trial court's conclusion that Richard's letter to Active Plumbing was a repudiation of the pricing element of the contract. Only one week prior to his letter, Richard had initialed every page of appellants' 17-page contract with Active Plumbing, which explicitly set forth the terms of the contract, including the $34,105 cost. But, in his letter, sent only days after signing the contract, Richard complained that Active Plumbing had used "bait and switch" tactics to make the sale and overcharged appellants nearly $12,000 for the cabinets, and then instructed Bob Kirk to contact him "to communicate your action plans to correct this situation." We read this as a clear statement of appellants' intention not to pay the contract price for the cabinets. In light of appellants' repudiation, Active Plumbing could have rightfully cancelled the contract at this point.

Instead, Active Plumbing offered appellants either a reduced price for the cabinets and a later delivery date or cancellation of the contract. Richard accepted the reduced price and agreed to modify the contract. However, when Bennett subsequently advised him of the new delivery date 9caused by appellants' repudiation) Richard told Bennett the date was "unacceptable" and would cost Active Plumbing "a lot of money." Richard's statements cannot be understood as anything other than a repudiation of the delivery terms of the contract. In light of appellants' second repudiation, Active Plumbing had the right to cancel the contract under R.C. 1302.77. Because Active Plumbing lawfully cancelled the contract, the trial court did not err in entering judgment against appellants.

Moreover, even assuming that Active Plumbing wrongfully cancelled the contract, appellants waived any right to sue for its breach because they acquiesced in the cancellation. "A contract will be treated as abandoned when the acts of one party inconsistent with the existence of the contract are acquiesced in by the other party." *Hudges v. Ettinger* (1934), 127 Ohio St. 460, 163. Abandonment of a contract need not be

express, but may be inferred form the conduct of the parties and the surrounding facts and circumstances. *Bryant v. Richfield Properties* (Sept. 5, 1990), 9th Dist. No. 14533, citing *Dickson v. Wolin* (1934), 18 Ohio Law Abs. 107. In such a case, the parties are restored to their original positions and neither may sue for breach nor to compel specific performance. *Hunting v. BPS Guard Serv.* (1995), 100 Ohio App.3d 532, 541, citing *Hodges* and *Bryant*, supra.

On May 6, 2005, Active Plumbing sent appellants a letter in which it stated that it was cancelling the contract and returning Richard's $17,000 deposit. By failing to notify Active Plumbing after the May 6 cancellation letter and deposit refund that they were disputing the termination and cancellation of the contract, and by retaining and not returning to Active Plumbing the refund check, appellants acquiesced in and agreed to the cancellation of the contract. Accordingly, the trial court properly held that appellants had no cause of action for breach of contract against Active Plumbing.

Finally, we agree with the trial court that appellants' claimed damages "were completely unsupported and absurd." As actual damages are an essential element of a breach of contract claim, see, e.g., *W & W Dev. Co. v. Hedrick* (Apr. 15, 1999), 8th Dist. No. 73965, and appellants failed to establish any damages, the trial court properly held that their breach of contract claim failed.

Appellants' assignment of error is overruled; judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

Appendix C

December 31, 2007 Trial Court Option (CUY. CO OH)

Timothy J. McGinty, Judge

This matter came before the Court for bench trial on December 12, 2007. Plaintiffs claim that Defendant breached a contract for an order of kitchen cabinets. Defendant denies breaching the contract and states that they cancelled the contract after Plaintiffs repudiated the contract.

Trial having been held, the Court finds as follows:

1 Plaintiff Joni Mihelich is the owner of a residence located at 32785 Burlwood Drive, Solon, Ohio. Joni Mihelich is marred to Richard Mihelich. Plaintiff RAM Management is a business of which Richard Mihelich is sole owner. Joni Mihelich claims to be a third-party beneficiary of a contract entered into between RAM Management and Defendant Active Plumbing Supply Co.

2. Defendant Active Plumbing Supply Cop. is a business that sells plumbing products and kitchen cabinets. Active Plumbing does not, however, do installation of the cabinets.

3. In February of 2005, Joni Mihelich began dealing with the store personnel at Active Plumbing's Brookpark Road locating regarding ordering new kitchen cabinets for her Burlwood Drive home. Over the next several weeks, Active Plumbing came to the home and took measurements and put together a design for new cabinets for the kitchen. The cabinets that the Mihelichs wanted were custom made cabinets from Omega which had to be specially ordered.

4. On March 28, 2005, the Mihelichs placed an order, through the business RAM Management, with Active Plumbing for their custom-order cabinets. The total price for the cabinets was $34,105.00. Richard Mihelich signed the order form for the cabinets at this price, also signing every page of the order acknowledging that it was customized, and paid a down payment of $17,000.00 for the cabinets.

5. On April 4, 2005, after signing the agreement for the cabinets at the $34,105.00 price, Richard Mihelich sent a letter to Active Plumbing complaining about the price of the cabinets and the additional delivery time, and stating that he believed this was a "bait and switch" tactic.

6. In response to this letter, Stuart Bennett of Active Plumbing called Richard Mihelich immediately to discuss the situation and make sure that he still wanted the cabinets because they were custom order and could not be returned. However, he could not get a hold of Mr. Mihelich for several days.

7. When Stu Bennett and Mr. Mihelich finally spoke he was demanding a reduction in price and they then began to renegotiate a new agreement and he offered to give an additional $1,7000.00 discount off the price of the cabinets. However, because Mr. Mihelich had repudiated the original agreement the delivery time for the cabinets would be delayed for approximately three weeks. The Defendant did not want to put in a custom cabinet

order until they were sure the Plaintiff's wanted it or the Defendant would be left holding the bag.

8. Mr. Mihelich said that the delay in delivery time was unacceptable him. Robert Kirk of Active Plumbing then told Mr. Mihelich that Active Plumbing was canceling the order for the cabinets and returning the deposit. It had become clear that Plaintiff's were never going to be satisfied with the product or services. This was confirmed by the send of a fax to Mr. Mihelich on 05/06/2005 acknowledging that a check for $17,075.60 was mailed to the Mihelichs that day.

9. The Mihelichs denied receiving the check, despite Mrs. Mihelich stating that she had seen it in her deposition testimony. Upon questioning at trial, Mr. Mihelich further testified that he had received letters from Active Plumbing, but he had never opened them so he did not know if they had received the check or not.

10. The Michelichs did not have any further contact with Active Plumbing Supply Co. until the filing of the lawsuit.

11 Subsequent to their dealings with Active Plumbing, the Mihelichs then sought to order their cabinets from other companies. On 05/06/2007, the day that Active Plumbing cancelled their order, they received a quote from Warehouse Cabinets that they could have the same cabinets in 6-8 weeks. The Mihelichs, however, did not order those. Rather, they waited until August of 2005 and ordered a completely different set of cabinets from Somrak Kitchens for $57,563.00. It was a higher quality and cost than the cabinet line the Plaintiffs had originally chosen.

12. Darlene Somrak of Somrak Kitchens testified that the cabinets ordered by Plaintiffs were with a new layout and design, which the Plaintiffs spend months to finalize.

13. The Mihelichs claim damages as follow:

a. $57,563.00 for the cost of their new cabinets.

b. $16,642.50 for a general contractor to install the cabinets (Active Plumbing's order was only for cabinets not installation).

c. $12,000.00 for Rich Mihelich's alleged lost vacation time.

d. $37,506.00 for loss of use of kitchen, which they estimate to be the cost of meals eaten out for 266 days.

e. $30,969.15 for loss of use of home, although they continued to live in their home, and this included mortgages, taxes and home insurance. all with interest at 18%, plus $18,783.88 for attorneys fees for a total of $274,899.96.

14. Joni Mihelich's claim for emotional damages for $300,000.00 was dismissed on summary judgment.

15. The Court having heard and reviewed all the evidence submitted in this matter finds by a preponderance of the evidence that Plaintiffs repudiated the contract with Defendant Active Plumbing. Despite having reached an agreement to purchase the cabinets for #4,000.00, the Mihelichs disputed this price and demanded a reduction in the price to continue with the deal. This is a repudiation of one of the essential terms of the contract and thus Defendant was within its rights to cancel the contract and return the deposit.

16. O.R.C. 1302.68 provides that "When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may: . . . (B) resort to any remedy for breach as provided in sections 1302.77 and 1302.85 of the Revised Code.

17. O.R.C. 1302.77(f) provides that when a buyer repudiates an aggrieved seller may cancel the contract.

18. Here, Plaintiffs entered into a contract for the sale of custom order cabinets for $34,105.00. Only a week later they contacted Defendant claiming "bait and switch" tactics and then demand a reduction in the price of the cabinets. Because Plaintiffs were backing out on the original deal, Defendant held off on placing the order so they would not be stuck with custom order cabinets that could not be resold. When they tried to negotiate the deal and give a $1,700.00 price reduction but a delayed delivery, this was not acceptable to the Plaintiffs. Defendants, therefore, cancelled the

original order because Plaintiffs had repudiated the price and would not accept the cabinets.

19. Further, when Plaintiffs were notified of the cancellation by the Defendants, they did not dispute the cancellation and demand that Defendant go through with the order. Rather, they had no further contact with Defendant, spent months seeking new quotes and then ultimately getting a new design for their kitchen with different cabinets that were over $20,000.00 more expensive.

20. Although not necessary to the analysis, as the Court finds that the Defendants rightfully cancelled the contract, the Court further notes that the claimed damages by Plaintiffs are completely unsupported and absurd. Plaintiffs are asking for damages over a quarter of a million dollars for $34,000.00 cabinets that they could have had in 6-8 weeks. The Plaintiffs themselves are responsible for their kitchen problems.

Judgment is hereby entered in favor of Defendant and against Plaintiffs Joni Mihelich and RAM Management. Costs to Plaintiff.

IT IS SO ORDERED.